IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT

JODHPUR

: J U D G M E N T :

KHAJAN SINGH & ORS. VS. STATE OF RAJASTHAN

D.B. CRIMINAL APPEAL NO. 44/2003
against the judgment dated 26.11.2002 passed by the learned Additional Sessions Judge (Fast Track), Anoopgarh, District Sri Ganganagar in Sessions Case No.131/2001.

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DATE OF JUDGMENT :: 28th MARCH, 2006

PRESENT

HON'BLE MR. N.N. MATHUR, J.
HON'BLE MR. MANAK MOHTA, J.

Mr. Hemant Jain, for the appellants.
Mr. Vishnu Kachhwaha, Public Prosecutor.
Mr. Manoj Kumar Garg] for the complainant.
Mr. Niranjan Singh]

Reportable

BY THE COURT : (PER HON`BLE MANAK MOHTA, J.)

1. The instant appeal is directed against the judgment of conviction and sentence dated 26.11.2002 passed by learned Additional Sessions Judge (Fast Track), Anoopgarh, Distict Sri Ganganagar in Sessions case No.131/2001 whereby the learned Judge has convicted and sentenced each of the appellants as under :-

BHAJAN SINGH

302 I.P.C.

Imprisonment for life and a fine of Rs.1000/-,in default payment of fine to further undergo three months' rigorous imprisonment.

148 I.P.C.

Two years' rigorous imprisonment and a fine of Rs.100/-, in default payment of fine to further undergo one months' additional imprisonment.

447/149 I.P.C.

Three months' rigorous imprisonment.

25(1B) (a) of Arms Act :

One years' rigorous imprisonment and a fine of Rs.100/-, in default payment of fine to further undergo one months' additional rigorous imprisonment.

27 of Arms Act :

Three years' rigorous imprisonment and a fine of Rs.500/-, in default of payment of fine, to further undergo two months' rigorous imprisonment.

KHAJAN SINGH :

302/149 I.P.C.

Imprisonment for life and a fine of Rs.1000/-,in default payment of fine to further undergo three months' additional rigorous imprisonment.

148 I.P.C.

Two years' rigorous imprisonment and a fine of Rs.100/-, in default payment of fine to further undergo one months' additional imprisonment.

447/149 I.P.C.

Three months' rigorous imprisonment.

BANTA SINGH :

PREM SINGH :

GURMUKH SINGH @ GURTHI :

302/149 I.P.C.

Imprisonment for life and a fine of Rs.1000/-,in default payment of fine to further undergo three months' additional rigorous imprisonment.

147 I.P.C.

One year's rigorous imprisonment and a fine of Rs.100/-, in default payment of fine to further undergo one month's additional rigorous imprisonment.

447/149 I.P.C.

Three months' rigorous imprisonment.

2. The prosecution case, as disclosed during trial, is that on 7.5.2000 on the statement of Malkhan Singh (Exhibit-D/26) recorded by police an FIR (Exhibit-P/27) under Sections 307, 447, 324, 323, 147, 148, 149 I.P.C. and Section 27 of the Arms Act was registered at P.S. Srivijay Nagar, District Sri Ganganagar against six accused persons, namely, Khajan Singh, Bhajan Singh, Gurmukh Singh @ Gurthi, Prem Singh, Banta Singh, Phaglu Singh and one more person alleging inter alia that Makhan Singh is having an agricultural land measuring 15 bighas and 4 biswas at Chak No.1MSD, Murabba No.135/343, which he purchased from one Gulam Kadar about two years back and since then he is in possession of the same, previously the land in question was in the

possession of Bhajan Singh, Khajjan Singh etc. The accused persons forcibly wanted to dis-possess complainant-Makhan Singh (deceased) from the land in question. On 7.5.2000 at about 1:00 p.m., Makhan Singh, his sons – Sikander Singh, Pakhar Singh, his brother-in-law Dilbagh Singh and friend-Sukha Singh were present in the 'Dhani' located at Killa No.11 in the said field, at that point of time, Bhajan Singh, Khajan Singh, Banta Singh, Prem Singh, Gurmukh Singh @ Gurthi sons of Banta Singh and two other persons formed an unlawful assembly and forcibly entered in the field of Makhan Singh and exhorted to go away from the field. Bhajan Singh was having a 12-bore single barrel gun and the rest of accused persons were having lathies and gandasies in their hands. On this, Makhan Singh and others ran towards the field of Hardayal Singh. Bhajan Singh with an intention to kill, made two gun-shots from the gun which he was having, one of the gun-shot hit Makhan Singh's right side of abdoman. Accused-Khajan Singh gave a 'gandashi' blow on the face of Makhan Singh, due to which Makhan Singh fell down, upon which the remaining accused persons gave beating to Makhan Singh on the back side of chest, lower-back and hands by lathies, on which, Makhan Singh shouted '**mara'**... **'mara'...** and on hearing the commotion, his sons, brother-in-law and Sukhha came for his rescue, upon which the accused persons took to their heels. The injured-Makhan Singh was taken to

Government Hospital, Srivijay Nagar and the police was called, where in presence of Dr. Devi Lal Bhakar (PW-12) dying declaration (Exhibit-P/26) of Makhan Singh was recorded and on that basis an FIR No.121/2000 (Exhibit-P/27) was chalked out under the above mentioned Sections. On the advise of doctor injured-Makhan Singh was referred to Bikaner Hospital but while Makhan Singh was being shifted, on way near Chhatargarh, he succumbed to the injuries sustained by him, upon which, he was brought back to Srivijay Nagar Hospital, where post-mortem of his dead-body was conducted on the next day. The offence of Section 302 I.P.C. was added.

3. After completion of investigation, police filed charge-sheet against Bhajan Singh, Khajan Singh, Gurmukh Singh and Prem Singh for the offence under Sections 302, 447, 147, 148, 149 I.P.C. and under Section 27 Arms Act. An additional charge-sheet was also filed against Banta Singh under the above mentioned offences. Later on supplementary charge-sheet against Bhajan Singh under Section 25(1-B)(a) of Arms Act and against Phaglu (in absentia) under Section 299 Cr.P.C. for the offence under Sections 302, 447, 147, 148, 149 and under Section 27 of Arms Act in the court of Judicial Magistrate, First Class, Srivijay Nagar and all were committed to the Sessions Court. Thereafter, the case was

transferred to the court of learned Additional Sessions Judge (Fast Track), Anoopgarh, District Sri Ganganagar where the present accused-appellants were tried and the proceedings against Phalku was separated. The accused-appellants pleaded not guilty to the charges framed against them and claimed trial.

4. The prosecution in support of its case examined as many as 17 witnesses, namely, PW-1 Resham Singh, PW-2 Ramji Lal Meena, PW-3 Tara Chand, PW-4 Vijay Kumar, PW-5 Sohan Lal Goswami, PW-6 Ganesh Kumar Bishnoi, PW-7 Om Prakash Jat, PW-8 Bhanwar Singh Rajput, PW-9 Sikander Singh, PW-10 Kaaraj Singh, PW-11 Kuldeep Singh, PW-12 Dr. Devi Lal, PW-13 Gurudutt Singh, PW-14 Dilbagh Singh, PW-15 Sukhdev Singh, PW-16 Ram Swaroop, PW-17 Ram Pratap and got exhibited certain documents as Exhibit-P/1 to Exhibit-P/56. The accused-appellants in their statements recorded under Section 313 Cr. P.C. denied the correctness of prosecution evidence appearing against them. The accused persons stated that there was a dispute going on between them and the complainant-party with regard to possession over the land in question. The complainant-party wanted to forcibly oust them from the 'dhani' and with that view they had been falsely implicated in this case. As per the accused-party, Makhan Singh and others were the aggressor. They attacked on them, Makhan

Singh made fire and caused injuries to Bhajan Singh, Smt. Mindo and Smt. Kaushalya. From the side of defence, no oral evidence was produced, however, certain documents were exhibited as Exhibit-D/1 to Exhibit-D/10.

5. After finally hearing the parties, the learned trial court having found the prosecution case proved against the accused-appellants beyond all reasonable doubts, turned down the defence version and held them guilty for committing murder of Makhan Singh. The learned court convicted and sentenced the appellants as mentioned above vide judgment dated 26.11.2002. Hence, this appeal has been filed. The learned trial court also decided Sessions Case No.18/2002 titled as cross-case by acquitting the accused on the same day.

6. We have heard Mr. Hemant Jain, learned counsel for the appellants, learned Public Prosecutor for the State Mr. Vishal Kachhwaha assisted by learned counsel for the complainant and have carefully gone through the record of the case.

7. During the course of arguments, learned counsel for the accused-appellants submitted that the learned trial court has not properly considered and appreciated the material available on

record and gave erroneous finding and as such the conviction of the accused-appellants is not sustainable. Learned counsel submitted that in fact the complainant-party was the agressor and they wanted to dis-possess the accused persons from the 'dhani' situated in Murabba No.135/243 as indicated in the site-plan (Exhibit-P/2) and for that they formed unlawful assembly. That apart, it was contended that Bhajan Singh, his wife Vero, sister-Bindo Bai, brother-Khajan Singh, nephew-Prem and Gorkha, brother-in-law Banta Singh and Bhojai-Kaushalya, who all were sitting in the field, when Makhan Singh, Sikander Singh, Pakhar Singh, Bagh Singh, Sukha Singh and 4-5 others came and forcibly tried to oust the accused-party from the 'Dhani'. Makhan Singh opened fire with his 12-bore double barrel gun. At that time other persons accompanying Makhan Singh were having lathies and gandashies in their hands. It was contended that the cartridge of gun-shot hit Bhajan Singh's leg and so also Bhajan Singh's sister-Smt. Mendo and 'bhojai' Smt. Kaushalya. At that time, Smt. Kaushalya and Smt. Mendo snatched the gun from the hands of Makhan Singh, which was taken by Bhajan Singh, who shot fire in defence at Makhan Singh. Thereafter, Bhajan Singh produced that gun before the police and lodged FIR No.122/2000 (Exhibit-D/1) against Makhan Singh, Sikander Singh, Pakhar Singh, Bagh Singh, Sukha Singh and 4-5 persons. It was submitted that the police also

investigated the cross-case and submitted charge-sheet against Sikander Singh and others for the offence under Sections 307, 324, 447/149, 147, 148 I.P.C. and 27 of Arms Act, which was titled as cross-case No.18/2002 – State of Rajasthan Vs. Sikander Singh & Ors. but the learned trial court has not given due weightage to the defence version and has concluded the matter one sided and on this count the judgment is not sustainable.

8. Learned counsel for the appellants further pleaded that finding of the trial court is based on the evidence of PW-9 Sikander Singh, PW-14 Dilbagh Singh and PW-15 Sukhdev Singh, who are respectively son, brother-in-law and friend of deceased-Makhan Singh. They are interested witnesses and accused of cross-case hence on their testimony conviction of the accused-appellants is not sustainable as there are several contradictions and inconsistencies in their statements and, therefore, no conviction can be based thereon.

9. The learned counsel further contended that the prosecution has not been able to prove the place of occurrence. PW-9 Sikander Singh and other witnesses stated that the incident took place at Kila No.21 and 22 in Murabba No.135/343 but the Investigating Officer stated that the incident took place in Murabba

of Hardayal Singh at Kila No.25. Likewise, it is also not clear from the prosecution side that from where Bhajan Singh fired. In this way, the story put forward by the prosecution is doubtful and no conviction can be maintained.

10. Learned counsel for the appellant submitted that the learned trial court has given much emphasis on the dying declaration (Exhibit-P/26) given by deceased-Makhan Singh. It was urged that looking to the position of deceased-Makhan Singh and further to the statement of Dr. Devi Lal (PW-12), he was not in a position to give statement. It was also urged that the police officer has not obtained fitness certificate before recording of the dying declaration. Thus, it was submitted that the dying declaration is a concocted document and no importance should be given to that.

11. The learned counsel for the appellant also submitted that on the very same day, the accused-party had lodged FIR in the Police Station. Injury reports of Smt. Mindo W/o. Banta Singh and Bhajan Singh were produced in defence but the prosecution has not been able to explain how the injuries were caused to the accused persons. Their remains serious doubts about the prosecution story and it can easily be inferred that the incident did not happen in the way it has been stated but the learned trial court has not taken into

consideration this material aspect of the case.

12. It was also stated that the recoveries of weapons are also doubtful. It is said that the gun has been recovered at the instance of Bhajan Singh and 'gandasi' has been recovered at the instance of Khajan Singh but the very recoveries have been shown from places which were not in the exclusive possession of accused persons. They are not trustworthy. Likewise from the other accused persons lathies are said to have been recovered but that does not inspire confidence. During the course of arguments, learned counsel for the appellant relied upon the following citations :

1. Gopal & Ors. Vs. State of Raj. [1989 Cr. L.R. (Raj.) 291
2. Bharosi Gurjar & Ors. Vs. State of Raj. [2006(2)RDD 1238 Raj.DB]
3. Shiv Lal & Five Ors. Vs. State of Raj. [2006(3)RDD 1257 Raj. DB]

13. On the above submissions, it was urged that the prosecution has not been able to prove the charges levelled against the accused persons. Lastly, it was prayed that the appeal may kindly be allowed, judgment of conviction and sentence may kindly be set aside and the accused-appellants be acquitted.

14. On the contrary, the learned Public Prosecutor appearing on behalf of State refuted the contentions placed by the learned counsel for the appellant and supported the judgment. It was submitted that merely because the witnesses are relatives and interested persons, their testimony cannot be discarded and in that case it becomes the duty of the court to appreciate their evidence with extra care and caution. It was also submitted that the complainant-party was not the aggressor but it was the accused-appellants who wanted to dis-possess the complainant-party from the field and they formed unlawful assembly and with preparation attacked the complainant-party, as a result of which Makhan Singh died. The accused-Bhajan Singh was having a 12-bore single barrel gun and fired two gun-shots. One gun-shot was fired when Makhan Singh was running to escape towards the adjoining field of Hardayal Singh and the second gun-shot hit him, when he fell down in Kila No.25 of that field during beating. It was urged that the prosecution has been able to prove the case beyond reasonable doubt against the present accused-appellants. It was also submitted that Makhan Singh was taken to hospital, where on the satisfaction of PW-8 Bhanwar Singh statement of Makhan Singh (Exhibit-P/26) was recorded in presence of Dr. Devi Lal (PW-12), who has certified on the statement that the deceased was in a fit state of mind to give statement and the same is deposed in evidence of Dr. Devi Lal

(PW-12). The learned trial court has rightly relied upon his statement. The learned Public Prosecutor also submitted that the accused-party had later on lodged cross-case in defence to escape from the responsibility of conviction and the learned trial court has rejected their version and convicted the accused persons. Thus, the defence version has no locus standi. It was also submitted that the prosecution has proved its case with the aid of eye-witnesses and they are corroborating each other. Thus, looking to their statement, it was not necessary for the prosecution to explain the injuries sustained by the accused persons. The accused persons have not come in defence and merely they have produced injury reports of Bhajan Singh and Smt. Mindo. The injured persons have also not come in evidence. Thus, the learned trial court has rightly rejected their defence. The authorities submitted by the learned counsel for the appellants do not apply to the present case. Thus, it was prayed that the judgment of conviction and sentence passed by the learned trial court be maintained and the appeal may be rejected.

15. Before adverting to the contentions raised by the learned counsel for the appellant, it would be just and proper to briefly survey the oral evidence adduced by the prosecution :

16. **PW-1 Resham Singh and PW-10 Kaaraj Singh** are

the witnesses of Fardats. **PW-1 Resham Singh** has stated in his statement that on 8.5.2000 he saw the dead-body of Makhan Singh. Fard-Surat-Haal-Lash (Exhibit-P/1) and site-plan (Exhibit-P/2) were prepared before him and A to B are his signatures. He has further stated that police collected blood contained soil, simple soil and 'Daat' of 12-bore gun vide Exhibits-P/3, P/4 and P/5 and sealed them on the spot. **PW-10 Kaaraj Singh** stated that the police prepared site-plan (Exhibit-P/2). Police also recovered blood contained soil and other material from the site and prepared Fards Exhibit-P/3, P/4 and P/5 and got his signatures at C to D on them. He has further stated that police also recovered blood contained cloths of deceased-Makhan Singh vide Exhibit-P/28 and C to D is his signature. He has stated that the land in question belonged to Gulam Kadar, from whom Makhan Singh purchased the said land vide agreement (original) Exhibit-P/51. Copy of that agreement is Exhibit-P/51A. He further stated that on the agreement, Gulam Kadar appended his thumb impression at three places whereas he and Jagir Singh put their signatures as witnesses. The agreement was attested by Notary Public. In cross-examination he further stated that the injured-Makhan Singh was lying in Kila No.25 of Hardayal Singh. The land of Hardayal Singh is adjacent to the land of Makhan Singh. He has also stated that blood contained soil and simple soil were collected from the field of Hardayal Singh where

Makhan Singh was beaten.

17. **PW-2 Ramji Lal** is an important witness. He is the Patwari of that area. He stated that Chak No.1 MSD, Murabba No.135/343 measuring 15 bighas and 4 biswas stand in the name of Gulam Kadar and was permanently allotted to Gulam Kadar. Jamabandi of that land (Exhibit-P/-6) and Exhibit-P/7 stand in the name of Gulam Kadar. He has further stated that since the day of his posting, he had seen Makhan Singh was cultivating the said land and after the murder of Makhan Singh, his legal heirs are cultivating the same.

18. **PW-3 Tara Chand and PW-6 Ganesh Kumar** are the witnesses of Malkhana Incharge of concerned Police Station. PW-3 Tara Chand has stated that on 7.5.2000, he was posted as Incharge Malkhana of P.S. Vijaynagar. He further stated that on 8.5.2000 three sealed packets were deposited by Bhanwar Singh, Sub-Inspector. On 9.5.2000, 17.5.2000, 19.5.2000 and 25.5.2000, the concerned Investigating Officer i.e. Bhanwar Singh, Sub-Inspector deposited items in sealed packets pertaining to FIR No.121/2000 (State Vs. Khajan Singh & Ors.). He made entry in Malkhana Register (Exhibit-P/8). He further stated that the sealed packets remained intact with him during his tenure. **PW-6 Ganesh Kumar**

stated that on 6.8.2000 he gave three sealed packets to Sohan Lal (FC) for depositing in FSL, Jodhpur and four sealed packets to Vijay Kumar (FC) for depositing in FSL at Jaipur and made entry to that effect in Exhibit-P/8. He also stated that on 21.8.2000 a sealed packet was deposited by Shri Om Prakash Godara, SHO, Vijaynagar and he made entry in Exhibit-P/8 at item No.11.

19. **PW-4 Vijay Kumar and PW-5 Sohan Lal** are Constables and were the carriers of articles for depositing the same at FSL, Jaipur and Jodhpur. **PW-4 Vijay Kumar** stated that he received four packets from Ganesh Kumar concerning FIR No.121/2000 and deposited the same at FSL, Jaipur and obtained receipt (Exhibit-P/10). He has also stated that he obtained covering letter from Superintendent of Police, Sri Gangangar and the carbon copy of that letter is Exhibit-P/12. He stated that the goods remained intact with him and in sealed condition he deposited the articles at FSL, Jaipur. **PW-5 Sohan Lal** stated that he received three sealed packets from Malkhana Incharge Shri Ganesh Kumar and obtained letter from the Superintendent of Police, Sri Gangangar, deposited the goods at FSL, Jodhpur and obtained receipt (Exhibit-P/12). The carbon copy of letter issued by the SP, Sri Ganganagar is Exhibit-P/14.

20. **PW-9 Sikander Singh, PW-14 Dilbagh Singh and PW15 Sukhdev Singh** are the eye-witnesses of occurrence and they are the son, brother-in-law and friend respectively of deceased-Makhan Singh. **PW-9 Sikander Singh** has stated that on 7.5.2000 at about 1:00 p.m., he was watering Murabba No.135/343, at that time, Pakhar Singh, Dilbagh Singh and Sukhdev Singh were also there. He stated that they took the possession of field from Gulam Kadar and before taking of possession, Bhajan Singh etc., were cultivating the field. He had cultivated wheat and was watering the field. At that time, Bhajan Singh, Khajan Singh, Premi, Gurkhi, Banta Singh and Phalgu came exhorting "maar-do-maar-do". At that time, his father-Makhan Singh was burning the garbage of wheat-husk in Killa No.21 and 22. He further stated that Bhajan Singh was having a gun, Khajan Singh was holding 'gandasa' and others were having lathies. At that time, Bhajan Singh fired gun-shot which hit on his father-Makhan Singh's back while he was running. The other accused persons attacked with lathies and Khajan Singh attacked with 'gandasa' on the face of Makhan Singh. He further stated that his father ran towards the field of Hardayal Singh and due to beating, his father fell down in Kila No.25. Bhajan Singh thereafter fired gun-shot on his father's abdomen. His father got seriously injured. The injured was picked up and taken to hospital, where police recorded his statement.

Looking to the serious nature of injuries, doctor referred for treatment at Bikaner Hospital and while Makhan Singh was being taken to Bikaner, on way at Chhatargarh he died. The blood-smeared cloths (Exhibit-P/28) of Makhan Singh were removed in his presence at Vijaynagar Hospital. The police prepared Exhibit-P/28 and site-plan (Exhibit-P/2) in his presence and the post-mortem of dead body was conducted. In his cross-examination, he has stated that at the time of incident, his father was standing in Kila No. 21 and 22. He also stated that the first gun-shot hit his father in Kila No.21 and 22. The second gun-shot hit his father in Kila No.25 i.e. the field of Hardayal Singh. He denied the suggestion that his father was having a 12-bore double barrel gun by which he fired at Bhajan Singh and injured him. He also denied that Bero Bai, Kaushaliya, Mindo Bai were injured due to firing made by Makhan Singh. He also denied that on the day of occurrence he, his brother-Pakhar Singh, uncle-Bagh Singh, father-Makhan Singh and 4-5 others armed with weapons came to the 'dhani' of accused persons in order to dis-possession them and his father fired at Bhajan Singh and Bhajan Singh in his right to private defence snatched away the gun from Makhan Singh and fired at him due to which Makhan Singh fell down at Bhajan Singh's dhani and thereafter he had been lifted to the field of Hardayal Singh. He was confronted with his previous police statement (Exhibit-D/8). We have seen the relevant portions and

there are no material contradictions. He has also stated that blood contained soil was collected by the police from Kila No.25 of Hardayal Singh where his father was lying. Further he has also denied that Gulam Kadar did not give possession of that land to them. **PW-14 Dilbagh Singh** has stated that deceased was his brother-in-law. He stated that Makhan Singh is having land at 1 MSD. He came there for watering the crops. At that time alongwith him, Sikander Singh, Pakhar Singh, Makhan Singh and Sukha Singh were also present there. Makhan Singh was burning garbage. At that time Bhajan Singh, Khajan Singh, Banta Singh, Prem Singh, Gurpreet and two other persons came from the side of 'dhani'. Bhajan Singh was having a 12-bore single barrel gun. Khajan Singh was having a 'gandashi' and the others were armed with lathies. He has further stated that Bhajan Singh fired a gun shot when Makhan Singh was running towards the western side i.e. the field of Hardayal Singh and the second gun shot was fired in Kila No.25, which is the field of Hardayal Singh. He also stated that Khajan Singh attacked Makhan Singh with 'gandasha' and others attacked with lathies. He further stated that when they exhorted, the accused persons fled away from the seen, thereafter they lifted Makhan Singh and took him in a jeep to Vijaynagar Hospital. There he was treated by the doctor and thereafter the police came. Police recorded the statement of Makhan Singh. On the advise of doctor,

Makhan Singh was lifted to Bikaner Hospital and he died on the way. Later on Makhan Singh's dead-body was taken back to Vijaynagar Hospital, where Panchayat Nama (Exhibit-P/29) was prepared by the police, which bears his signature I to J. There is a lengthy cross-examination of Dilbagh Singh (PW-14). He was confronted with his previous police statement (Exhibit-D/10). We have gone through the relevant portions and there are no material contradictions. In cross-examination, nothing came out to destroy his veracity. **PW-15 Sukhdev Singh** has stated that he knew Makhan Singh. He was his friend. On the day of occurrence, in order to bring trolley he went to Makhan Singh's house at 2 LC, from where he came to know that Makhan Singh had gone to his field at 1 MSD, upon which he reached the field at about 12:30 p.m. At that time, Pakhar Singh, Sikander Singh and Dilbagh Singh were watering the crops and Makhan Singh was burning the garbage of wheat-husk. He was talking with Sikander etc. Near about 1 p.m., Bhajan Singh, Khajan Singh, Banta Singh and 6-7 persons came from the side of 'dhani'. They were hurling abuses and raising shouts and threatened them to go away from the field. Bhajan Singh was having single barrel gun, Khajan Singh was having 'gandashi' and the remaining persons were having lathies. Gurmukh, Phalku and one other man were also having lathi. He stated that Makhan Singh ran towards western side and Bhajan

Singh hit gun-shot from behind the back of Makhan Singh. Later Makhan Singh was chased and surrounded by them. Bhajan Singh fired at Makhan Singh and all of them gave beatings to Makhan Singh. Khajan Singh hit Makhan Singh by 'gandashi'. Makhan Singh fell down due to gun-shot injury. The accused persons fled away towards 'dhani' leaving behind Makhan Singh. Thereafter, Makhan Singh was lifted to hospital where police recorded statement of Makhan Singh. In cross-examination he stated that Makhan Singh was burning garbage of wheat-husk in Kila No.22-23. He also stated that when Bhajan Singh fired at Makhan Singh from his back side, then he ran towards the Kila No.23 then to the adjoining field of Hardayal Singh, where he fell down in Kila No.25. He has also stated that Bhajan Singh fired two gun shots at Makhan Singh. He has denied the defence version that Makhan Singh fired with double barrel gun at Bhajan Singh and in right of private defence Bhajan Singh snatched gun from Makhan Singh and fired at Makhan Singh. He was confronted with his previous police statement (Exhibit-D/9). We have seen the relevant portion but there is no material contradictions.

21. **PW-12 Dr. Devi Lal** is the doctor who examined injured-Makhan Singh for the first time on 7.5.2000 and later on he conducted the post-mortem also. He stated that on 7.5.2000 he

was posted as Sr. Medical Officer at C.H.C., Vijaynagar. He examined Makhan Singh and found the following injuries vide Exhibit-P/52 :

1. Incised wound 3”x1/4”x1/4” on left side of face mid.
2. Inlet wound (inv margin). No blackening & Tatoing 1”x1” round on right side mid x deep abd. Just lat to umbilias.
3. Wound of outlet 3/3”x1/9” on rt hip upper most region post.
4. 4 Bruise round each 3/4”x3/4” on Rt. Upper abd.
5. Abrasion 3/4”x1/4” on lt side abdomen laterall.y
6. Abrasion 3”x Limb on Lt chest lateral.
7. 5 Pallet injury 1/8”x1/6”x skin deep to muscle on Lt hip (left hip anterio lateral in 12”x12” area). From hip two pallets recovered and from outlet plastic type bullet cover recovered.”

He has further stated that injury No.1 was of a sharp-edged weapon, injury No.2 and 3 were the result of single injury and that was by fire-arm. Injury No. 4, 5 and 6 were the injuries caused by blunt weapon. He has further stated that injury No.7 was also of fire-arm. In the opinion of doctor injury No. 2 was sufficient in the ordinary course of nature to cause death. He has stated in his statement that he took out two cartridges from the hip of deceased and one plastic type bullet cover from the outer side of the injury and sent them to FSL, through the SHO, P.S. Vijaynagar. A true copy of that forwarding letter is Exhibit-P/53, which bears his

signature at A to D. He stated that police came into hospital and took statement of Makhan Singh (Exhibit-P/26) in his presence. At the time of recording of the statement, Makhan Singh was in a fit state of mind to give statement and he made his endorsement in this respect on Exhibit-P/26 i.e. K to L and bears his signature M to N. He has stated that he advised to take Makhan Singh for treatment at Bikaner Hospital but on the way Makhan Singh died. The dead-body was brought back and the post-mortem was conducted on 8.5.2000. He has further stated that in his opinion, the cause of death of Makhan Singh was fire-arm injury on the abdomen. He prepared post-mortem report (Exhibit-P/54), which bears his signature A to B. In cross-examination he has also stated that injury No.7 was caused from a distance more than 6 feet which could extend upto a distance of 20 feet.

22. **PW-11 Kuldeep Singh** is the witness of recovery of gun. He has stated that police recovered 12-bore single barrel gun and two empty cartridges in his presence at the instance of Bhajan Singh. Recovery memo (Exhibit-P/33) and site-plan of recovery (Exhibit-P/34) were prepared in his presence, on which he made signatures E to F. In cross-examination he has denied that the gun was recovered in pieces.

23. **PW-13 Gurudatt Singh** is the witness of recovery of 'gandashi' from Khajan Singh. He said that at the instance of Khajan Singh one 'gandashi' was recovered by the police and the same was sealed on the spot vide recovery memo (Exhibit-P/37) and the site plan of that recovery is Exhibit-P/38 which bears his signature C to D.

24. **PW-16 Ram Swaroop** is the witness of recovery of lathi. He has stated that at the instance of Banta Singh police recovered lathi from the 'dhani'. Banta Singh was arrested vide fard (Exhibit-P/20). Exhibit-P/21 in the recovery memo and the site plan of that recovery is Exhibit-P/22. All these memos bear his signatures C to D.

25. **PW-7 Om Prakash, PW-8 Bhanwar Singh and PW-17 Ram Pratap** are the Investigating Officers and SHO of the Police Station. **PW-8 Bhanwar Singh** is the first IO. He stated that on 7.5.2000 he was posted as SHO, Vijaynagar and on that day at about 3-3:15 p.m. he received a telephonic message from the Sr. Medical Officer, Vijaynagar to the effect that one Makhan Singh who had received fire-arm injury was admitted in hospital, on this, he reached hospital and on certification by treating doctor that the injured-Makhan Singh is in a fit state of mind to give statement,

recorded his statement (Exhibit-P/26), which bears his signature A to B. Makhan Singh also appended his thumb impression on the statement and C to D is the signature of Makhan Singh. He further stated that on Exhibit-P/26 K to L is the certificate given by doctor and M to N is the signature of doctor. On the basis of statement (Exhibit-P/26), FIR (Exhibit-P/27) was chalked out by him which bears his signature A to B. He has also stated that vide Exhibit-P/28 blood-smeared cloths of Makhan Singh were collected and sealed in the presence of two motbirs, namely, Kaaraj Singh and Sikander Singh. He has also stated that after the death of Makhan Singh Fard Surat Haal Laash (Exhibit-P/1) and Panchayat Nama of dead body (Exhibit-P/29) was prepared and on these memos A to B are his signatures. He has further stated that he prepared site-plan (Exhibit-P/2) and Haalat Moka (Exhibit-P/2A) in presence of independent witnesses. He also collected blood contained soil, simple soil and 'datt' of 12-bore gun from the site and sealed them on the spot in presence of independent witnesses vide Exhibit-P/3, P/4 and P/5 respectively. He recorded statement of witnesses and arrested Bhajan Singh vide arrest arrest memo (Exhibit-P/31) and on the information (Exhibit-P/32), at the instance of Bhajan Singh a 12-bore single barrel gun and two empty cartridges were recovered vide (Exhibit-P/33) and the site plan of that recovery (Exhibit-P/34) was prepared. He also arrested Khajan Singh vide arrest memo

(Exhibit-P/35) and at the instance of accused-Khajan Singh recovered one 'gandashi' vide recovery memo (Exhibit-P/37) in presence of independent witnesses and the site plan of that area is Exhibit-P/38 was prepared and those exhibits bears his signature C to D. Likewise, he also arrested Gurmukh Singh vide arrest memo (Exhibit-P/39), Exhibit-P/40 is the information given under Section 27 of Evidence Act and at his instance recovered one lathi vide recovery memo (Exhibit-P/41) and the site plan of that recovery is (Exhibit-P/42). Similarly, he also arrested Prem Singh vide arrest memo (Exhibit-P/43), Exhibit-P/44 is the information given under Section 27 of Evidence Act and at his instance recovered one lathi vide recovery memo (Exhibit-P/45) and the site plan of that recovery is (Exhibit-P/46). He has further stated that during investigation, he obtained agreement pertaining to the land in question and record of land i.e. Jamabandi and thereafter he was transferred and he handed over the case to Bhopal Singh, Sub-Inspector. In cross-examination he denied the suggestion that he obtained thumb impression of Makhan Singh on blank paper and later wrote that statement. He also denied the suggestion that at the time of recording of statement doctor was not present. Again he has stated that Makhan Singh was in a fit state of mind to give statement and after satisfaction he recorded the statement of Makhan Singh. In cross-examination he has stated that after

registration of this case on 7.5.2000, Bhajan Singh came to police station for lodging a report under Section 307 I.P.C. against Makhan Singh etc. and he surrendered a 12-bore double barrel gun. Copy of surrender of gun is Exhibit-D/2. He also prepared site plan and Haalat Moka in that case i.e. Exhibit-D/3 and Exhibit-D/3A. He denied the suggestion that recovery of gun, gandashi and lathies have been falsely shown. He also denied this fact that no information under Section 27 of Evidence Act was given by the accused persons and no recovery was made at the instance of accused persons. **PW-7 Om Prakash** has also investigated the case. He stated that he recorded the statement of witnesses. He also stated that he wrote letters to Superintendent of Police for sending the incriminating materials for analysis to Forensic Science Laboratory, Jaipur and Jodhpur and the carbon copies of said letters is Exhibit-P/16 and Exhibit-P/17, which bears his signatures as A to B. The specimen slips (Exhibit-P/18 and P/19) bear his signatures at A to B. He also stated that he filed charge-sheet in the court against the accused Khajan Singh, Bhajan Singh, Gurmukh Singh @ Gurpreet and Prem Singh under Sections 302, 447, 147, 148, 149 I.P.C. and under Section 27 of Arms Act. On 21.8.2000 vide Exhibit-P/20 Banta Singh was arrested and at his instance lathi was recovered vide Exhibit-P/22 and the site plan of that place of recovery (Exhibit-P/23) were prepared in presence of independent

witnesses and bears his signatures. He has further stated that on 13.11.2000 he filed charge-sheet against Banta Singh and the investigation was kept pending against Phalku. In cross-examination he denied that any fake recovery of lathi has been shown from Banta Singh. **PW-17 Ram Pratap** was the SHO of concerned Police Station. He has stated that on 5.9.2001 he received Ballestic Expert report (Exhibit-P/55) from FSL, Jaipur and as per that report, the gun which was recovered from Bhajan Singh was a servicable fire-arm and since fire-arm was used without licence, he moved to the District Magistrate, Sri Ganganagar for granting him sanction for filing charge-sheet under Section 3(1) read with Section 25(1-B) (A) of Arms Act. He has further stated that after receiving sanction from District Magistrate, Sri Ganganagar (Exhibit-P/56) he filed charge-sheet against Bhajan Singh Section 3(1) read with Section 25(1-B) (A) of Arms Act.

26. We have considered the contentions raised by the learned counsel for the appellants in the light of the material available on record. A contention was raised that the eye-witnesses of occurrence, namely, PW-9 Sikander Singh, PW-14 Dilbagh Singh and PW15 Sukhdev Singh are the close relative and friend of deceased and there is no independent witness and as such their testimony should be discarded. In our opinion, merely because the

eye-witnesses are close relative and friend of deceased, their evidence cannot be discarded and in that situation it becomes the duty of court to analyse their evidence with extra care and caution. It is revealed from the judgment of the learned trial court that the learned Judge has kept this fact in mind while analysing their evidence. Presence of eye-witnesses has not been disputed and their presence is natural. It is also revealed that against them, the accused-party had lodged separate criminal case but that was not accepted by the learned trial court. Thus, the contention raised by the learned counsel in this respect is not tenable.

27. That during the course of arguments, much stress was given by the accused-appellant's side on the dying declaration (Exhibit-P/26). It was contended that the position of Makhan Singh at that time was critical and as per the medical report, he was not in a position to give statement. We have seen the statement of PW-8 Bhanwar Singh (IO), who has recorded the statement of Makhan Singh. He has specifically stated that before recording the statement, he obtained satisfaction from the treating doctor i.e. Dr. Devi Lal (PW-12) that the injured was in a fit state of mind and then only he recorded the statement in his presence. PW-12 Dr. Devi Lal has also stated that at that time injured-Makhan Singh was in a fit state of mind to give statement and he gave his certificate

on his statement. We have gone through the dying declaration (Exhibit-P/26) which was recorded by PW-8 Bhanwar Singh in his own handwriting and Makhan Singh appended his thumb impression and put his signature at the end of the statement, as discussed above. We have looked into the statement (Exhibit-P/26) and for ready reference the relevant portion of that statement is quoted here-in-below :

> " करीब 1 बजे दिन भजनसिंह, खजानसिंह, बन्तासिंह व बन्तासिंह के लड़के प्रेम व गुरथी, दो आदमी और जिनको मैं नहीं जानता हमारे खेत में आये और हमें ललकारा कि खेत से निकल जाओ। इनमें भजनसिंह के पास एक नाल 12 बोर बन्दूक थी बाकी सभी के पास लाठियां व गंडासिंया थी। हम सभी हरदयाल के खेत में आ गये तब भजन सिंह ने मुझे जान से मारने के लिये 12 बोर बन्दूक के दो फायर किये जिनमें से एक फायर मेरे पेट में दाहिनी तरफ लगा। खजान सिंह ने मेरे गंडासी की चोट मारी जो मेरे मुंह पर बाई तरफ लगी। मैं जमीन पर गिर गया गिरे हुवे के मेरे मगरों पे, हाथों पर व पीठ पर सभी ने लाठियों की चोटें मारी। मैंने मार दिया-2 का रोला किया।"

Thus, the contention raised in respect of dying declaration are not sustainable, on the contrary, Exhibit-P/26 is of significant value.

28. We have also considered the contention raised by the learned counsel for the accused-appellants that the complainant-party was the aggressor and it was Makhan Singh who opened fire

at Bhajan Singh and Bhajan Singh snatched that gun from Makhan Singh and in his right of private defence caused injury to Makhan Singh. From the prosecution side, PW-9 Sikander Singh, PW-14 Dilbagh Singh and PW15 Sukhdev Singh have denied that Makhan Singh first opened fire at Bhajan Singh. They have denied the very fact of presence of any gun with Makhan Singh. The eye-witnesses have categorically stated that before the occurrence, Makhan Singh was burning garbage of wheat husk in Kila No.21 and 22 of his field and the other members were watering the crops. It has not been established from the accused side that at that time complainant-party was not having possession over that land. It has also not been established that the complainant-party first entered the land in question whereas from the prosecution side, one important witness i.e. Ramji Lal (PW-2) who was the Patwari of that area has stated that from the day of his posting at that place, he had seen that Makhan Singh was cultivating the field lying at Chak 1 MSD Murabba No.135/343. He has also stated that in the revenue record the land stood in the name of Gulam Kadar as per Exhibit-P/6 and P/7. Thus, the immediate possession over the field is proved by the prosecution side to be that of the complainant-party. From the prosecution side, agreement to sell (Exhibit-P/51) has also been placed and that has been proved by Kaaraj Singh (PW-10). By virtue of that agreement it again stands corroborated that the land

in question was purchased by Makhan Singh and the possession was given to him. The learned trial court has also dealt with this plea at length. Looking to the material available on record, it is not believable that the complainant-party was the aggressor. Thus, the conclusion drawn by the learned trial court in this respect does not suffer from any infirmity or illegality.

29. We have also considered other contentions raised by the learned counsel that the prosecution has not been able to prove the place of occurrence but this is not sustainable. As per the eye-witnesses, PW-9 Sikander Singh, PW-14 Dilbagh Singh and PW-15 Sukhdev Singh, Makhan Singh was burning garbage of wheat-husk in Kila No.21 and 22, at that time accused-party came in the field of complainant-party and when Makhan Singh in order to save himself, ran towards the adjoining field of Hardayal Singh, on that, Bhajan Singh fired one gun-shot which hit on the backside, thereafter the other accused persons attacked him with 'gandashi' and lathies, as a result of which he fell down in Kila No.25 where second gun-shot was fired by Bhajan Singh on the abdomen of Makhan Singh. Thus, it is clear that the place of occurrence of crime is established. After beating, injured-Makhan Singh was lying in the field of Hardayal Singh, which has been shown in the site-plan (Exhibit-P/2) from where blood-contained soil and simple soil were recovered. Thus,

the contention placed by the learned counsel are not having any force. It was also contended that Makhan Singh opened fire by 12-bore double barrel gun, which hit Bhajan Singh, Smt. Mindo and Smt. Kaushalya and they received injuries but the prosecution has not been able to explain the injures on these persons but this contention is also of no importance. During trial, from the accused side simply the injury reports of Bhajan Singh and that of Smt. Mindo were placed but they have not been proved nor exhibited by any witness. The eye-witnesses have denied any sort of firing made by Makhan Singh. Thus, the accused party has not been able to establish that Makhan Singh fired gun-shot and they were injured by that fire-arm. It is also pertinent to mention here that the report made by the accused against the complainant-party was not found correct and the accused in that case relating to FIR No.122/2000 were acquitted.

30. Contention was raised also with regard to recovery of fire-arm and other weapons. It was stated that they do not inspire confidence. In this respect, attention was drawn towards Exhibit D/4, D/5 and D/6 and on that basis, it was stated that the information was given by Bhajan Singh from time to time under Section 27 but no recovery of fire-arm could materalise and later on recovery was shown at the instance of Bhajan Singh, the same is

not believable. On this contention, recovery of fire-arm at the instance of Bhajan Singh cannot be disbelieved. He has given information under Section 27 of Evidence Act vide Exhibit-P/32 and in pursuance of that information a 12-bore single barrel gun was recovered in presence of independent witnesses, namely, Harinder Singh and Kuldeep Singh vide Exhibit-P/33. PW-11 Kuldeep Singh has appeared and he corroborated the fact of recovery of gun. Likewise at the instance of information (Exhibit-P/36) given by Khajan Singh under Section 27 of Evidence Act, 'gandashi' has been recovered vide Exhibit-P/37 in presence of independent witnesses, namely, Gurudatta and Banarshi Dass. The site-plan of that recovery has also been prepared by the SHO as Exhibit-P/38. Similarly, at the instance of other accused persons lathies have been recovered by the SHO. It has been stated by the witnesses that the weapons were sealed on the spot and they remained intact. Thus, the contention raised by the appellant's side is having no force.

31. We have thoroughly considered the defence version placed by the learned counsel for the accused-appellants but looking to the material available on record, the dying declaration of Makhan Singh alongwith the statements of eye-witnesses, the contention raised by the learned counsel for the appellants that Makhan Singh

opened fire with gun and that gun was snatched by Bhajan Singh and Bhajan Singh fired with that gun in his right of private defence has not been established by the accused side. The eye-witnesses have denied this fact and from the defence side, no witness has been produced. Merely filing of FIR and placing injury report in defence will not serve any purpose. From the defence side Exhibit-D/1 copy of cross-FIR No.122/2000 and Exhibit-D/2 memo pertaining to surrender of 12-bore double barrel gun by Bhajan Singh has been placed on record but for want of evidence they do not support the defence version.

32. During the course of arguments learned counsel for the appellants also cited three authorities in support of his contention. We have gone through those authorities. In **Gopal & Ors. Vs. State of Rajasthan (supra),** the accused-appellants and deceased were close relatives and before the incident there was no bad blood between the parties, the incident took place on trivial issue and there was no intention to kill or cause bodily injury which is likely to cause death but that is not the position in the present case. In **Bharosi Gurjar & Ors Vs. State of Rajasthan (supra)** it was a case of free fight. The prosecution has not been able to establish as to who caused fatal injury to the victim, but this is not the situation in the present case. Here the eye-witnesses have specifically stated

that Bhajan Singh fired two gun shots and the injury which proved fatal was caused on the abdomen of deceased-Makhan Singh by fire-arm. In **Shiv Lal & Five Ors Vs. State of Rajasthan (supra)** it was a case of free fight and the prosecution was not able to prove which party was the aggressor but the present case is not a case of free fighting nature. Here the victim as well as the other members were engaged in their agricultural work and as per the statements of eye-witnesses and the version given by the deceased himself, the accused-party came to their field armed with weapons and gave beating. Thus, the contention of learned counsel for the accused-appellants are not of such nature that they create any doubts. Thus, the finding of the learned trial court cannot be said to be suffering from any infirmity.

33. The learned trial court has considered relevant material and gave its finding. As per PW-12 Dr. Devi Lal death of Makhan Singh was not natural but it was homicidal. The doctor has further stated that the injury No.2 which was caused by fire-arm was sufficient in the normal course of nature to cause death and that is further corroborated by the version given by the eye-witnesses. Thus, the conclusion drawn by the learned trial Judge is not suffering from any infirmity. It is also revealed from the record that all the accused persons participated in committing the crime. The

eye-witnesses of occurrence, namely, PW-9 Sikander Singh, PW-14 Dilbagh Singh and PW-15 Sukhdev Singh have categorically stated the role of accused persons and also stated that accused-Bhajan Singh fired two gun-shots on Makhan Singh, one while he was running to escape and second gun-shot was fired in Kila No.25 i.e. the field of Hardayal Singh. It has also been stated by the eye-witnesses that Khajan Singh gave 'gandashi' blow on the face of Makhan Singh and the others gave beating by lathies. These injuries are further corroborated by the injury report (Exhibit-P/52). Injury No.1 which is on the face has been linked with the injury caused by Khajan Singh. Injury No.2 and 3 is that of fire-arm forming a single injury, which has been caused by Bhajan Singh and injury No.7 is also linked to fire-arm, which was believed to be caused by Bhajan Singh. The dying declaration (Exhibit-P/26) is corroborated by the statements of eye-witnesses and vice-versa. The prosecution story is further supported by the other materials i.e. the blood-smeared soil, blood-stained clothes which contained human blood as per FSL Report (Exhibit-P/24), recovery of 12-bore single barrel gun with two empty cartridges, and cartridge collected by Dr. Devi Lal from the body of Makhan Singh and sent to FSL, Jaipur and as per that report (Exhibit-P/55), the fire-arm was found to be servicable and the other conclusions also support the prosecution story. Thus, the learned trial court has rightly held the

accused-appellants responsible for committing murder of Makhan Singh and they have been rightly convicted and sentenced. The finding of the learned trial court deserves to be maintained.

34. It is made clear that any observation made in appeal will not influence the trial court with regard to the trial of absconding accused-Phalku.

Accordingly, the appeal filed by the accused-appellants stands rejected. The judgment of learned trial court is confirmed and that is maintained. Bhajan Singh and Khajan Singh are already in jail. The bail-bonds of accused-appellants-Prem Singh, Gurmukh Singh @ Gurthi and Banta Singh stands forfeited, they will surrender before the learned Sessions Judge, Sri Ganganagar for serving out their remaining part of sentence.

(MANAK MOHTA), J. **(N.N. MATHUR), J.**

Sanjay/-